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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-162

HENRY D. DODSON and G. EVERETT MILLICAN,
Petitioners,

vs.

WILLIAM GRAHAM, JR., etc., et al., and METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, in this case, which is unreported, is appended hereto. The unreported opinion of the United States Court of Appeals for the Fifth Circuit is found in Petitioners' Appendix A.

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals correctly affirmed the District Court holding that federal jurisdiction was lacking and the litigation should be dismissed because:

1. Section 5 of the Voting Rights Act of 1965 [42 U.S.C.A. § 1973(c) (1970)] does not confer federal jurisdiction upon private litigants when the Attorney General of the United States approves a state law which is applicable to only one county and which transfers from the Ordinary of such county to a County Board of Elections the power and duty to conduct elections.

2. Section 11 of the Voting Rights Act of 1965 [42 U.S.C.A. §1973(i)(b) (1970)] does not confer federal jurisdiction to void an election on the grounds of intimidation of voters when the intimidation consisted solely of distribution of campaign literature and the persons bringing the suit have not been intimidated.

3. The State Court recount of the votes mooted petitioners' claim of an inadequate state law remedy.

STATEMENT OF THE CASE

Petitioners' statement of the case is neither complete nor entirely accurate. The facts of this case are found in the opinions of the Fifth Circuit and the District Court for the Northern District of Georgia which are appended to the Briefs.

The litigation arises out of the November 9, 1971, submission to the voters of Fulton County, Georgia, of the question of whether they favored the approval of a "Rapid Transit Contract and Assistance Agreement," pursuant to the provisions of Ga. L. 1965, p. 2243, Ga. L. 1966, p. 3264, and Ga. L. 1971, pp. 2082, 2092. The election was conducted by paper ballots pursuant to GA. CODE ANN. §34-806 (1970). As finally certified there were 53,760 votes in favor of the Contract and Assistance Agreement and 53,299 against it.

Within a few days of the official consolidation and certification of the returns of the election, suits quite similar to Petitioners' action were filed in the Superior Courts of Fulton and DeKalb Counties, Georgia. **Henderson v. County Board of Registration and Elections**, Superior Court of Fulton County, Civil Action No. B-69960; **Ollila v. Graham**, Superior Court of DeKalb County, Civil Action No. 64,015. Both the **Ollila** and **Henderson** suits sought a recount and the more drastic relief of having the election declared void. A full recount was ordered and held in the **Henderson** case. The recount showed that the number of votes cast for approval of the Contract and Assistance Agreement actually increased. A judgment was entered that the Contract and Assistance Agreement was approved.

A full hearing was held in the **Ollila** case and a final order was entered granting motions to dismiss. The Court

held that there was no jurisdiction in DeKalb County over the Fulton County Board of Registration and Elections and that the Board, not its employee Mr. Graham, was the proper defendant in a contest of the November 9 election.

Both cases were appealed to the Court of Appeals of Georgia, where the lower court judgments were affirmed. **Henderson v. County Board of Registration and Elections,** ... Ga. App. ..., ... S.E.2d ... (1972); **Ollila v. Graham,** ... Ga. App. ..., ... S.E.2d ... (1972). The Georgia Court of Appeals held in the two cases that: (1) It was not error for the trial judge to conduct the recount of the ballots without the intervention of a jury; (2) the trial judge properly disregarded alleged irregularities in two precincts where the rejection of the vote in those precincts would not change the results of the election; (3) there was no showing of a sufficient quantity of spoiled ballots, not accounted for, to place the result in doubt; (4) the Fulton County Board of Registration and Elections was the proper defendant in the election contest rather than any individual, and jurisdiction resided in the Superior Court of Fulton County. A subsequent petition by Henderson for certiorari to the Supreme Court of Georgia was denied. **Henderson v. County Board of Registration and Elections,** ... Ga. ..., ... S.E. 2d ... (1972).

Petitioners' complaint was brought in the instant case as a class action on behalf of all Fulton County residents who had voted against approval of the Contract and Assistance Agreement and was filed with the United States District Court for the Northern District of Georgia. The alleged bases for jurisdiction were the Equal Protection and Due Process Clauses of the Fourteenth Amendment, §5 of the Voting Rights Act of 1965 [42 U.S.C.A. §1973(c) (1970)], and §11 of the Voting Rights Act of 1965 [42 U.S.C.A. §1973(i)(b) (1970)].

The complaint alleged that votes in said election had not been counted correctly and that Defendant Graham was the public official who formerly declared the result of the election within the contemplation of GA. CODE ANN. §34-1701(b) (1970). Petitioners also alleged that election officials allowed Metropolitan Atlanta Rapid Transit Authority ("MARTA") supporters to distribute literature within 250 feet of polling places. They further alleged that although the Election Code of Georgia might be valid and constitutional, its application to the Fulton County election was unconstitutional since the contest provisions of the Code did not provide for contest in the factual situation presented by the Petitioners. Petitioners prayed that a recount of all ballots be conducted by the Court or in the alternative the election be declared void and illegal.

Petitioners later amended their complaint and alleged that 1967 Georgia Acts p. 3211 transferred the election duties of the Ordinary of Fulton County to the Fulton County Board of Elections and that this change had not been approved pursuant to the requirements of §5 of the Voting Rights Act of 1965. The amendment also alleged paper ballots were illegally used instead of voting machines. The amendment asked that a three judge court be convened pursuant to §5 of the Voting Rights Act.

The District Court received evidence, stipulations of fact, and heard argument by counsel for all parties. Petitioners filed an amendment in open court alleging that the State of Georgia had not filed a declaratory judgment nor sought the opinion of the Attorney General of the United States as required by §5 of the Voting Rights Act of 1965.

At the District Court hearing, counsel for Petitioners stipulated that neither of the Petitioners had been intimidated and that the intimidation alleged in the complaint

was based solely on the alleged presence of MARTA supporters at polling areas with pro-MARTA literature. Moreover, counsel for petitioners stipulated that the 1967 Georgia Act did not have any affect on the right to vote because of race or color.

The District Court held that correspondence which was received into evidence from the United States Attorney General's office clearly showed § 5 of the Voting Rights Act had been satisfied. The letters are quoted in full by the Fifth Circuit opinion. Brief for Petitioners, A-6, -7, -8, -9. The Court also held that the alleged passing out of campaign literature in polling areas would not constitute intimidation within 42 U.S.C.A. § 1973(i)(b) (1970). Finally, it held that the **Henderson** recount belied Petitioners' contention that state law did not afford an adequate remedy for contesting Fulton County elections and that regardless, such a complaint did not present a proper federal question.

The District Court dismissed the action for lack of federal jurisdiction. Petitioners appealed and the District Court opinion was affirmed by the Fifth Circuit Court of Appeals. The Court of Appeals agreed with the District Court that the record was void of anything that could possibly be construed to constitute intimidation, threats or coercion (or attempts at such) within the meaning of § 11(b) of the Voting Rights Act of 1965. The Court stated that the resolution of the non-federal issues by the Court of Appeals of Georgia in the **Henderson** and **Ollila** cases left for its determination only the question of whether the special election of November 9, 1971, was conducted in violation of § 5 of the Voting Rights Act of 1965. The Court quoted the correspondence involving the Fulton County Attorney, the Attorney General of Georgia, and the United States Attorney General. Noting that

the United States Attorney General specifically stated that he had no objection to enforcement of the Georgia laws in question, the Court held that there had been compliance with § 5 of the Voting Rights Act as well as with the regulations promulgated thereunder.

Contrary to Petitioners contentions, the ruling by the Court of Appeals was correct and properly disposed of all matters before it.

ARGUMENT

I

The Application for Writ of Certiorari Should Be Denied

Petitioners' attempt to prolong the litigation by seeking yet another review of the questions of federal jurisdiction is not a proper case for the granting of certiorari. See **Magnum Co. v. Coty**, 262 U.S. 159 (1923). No amount of strained semantics can convert the Court of Appeals holding that federal jurisdiction is lacking, into a decision warranting review by this Court on certiorari. The Court of Appeals decision affirming the District Court opinion was manifestly correct, and contrary to Petitioners' contentions, was in direct accord with the two recent decisions of this Court interpreting § 5 of the Voting Rights Act of 1965. See **Perkins v. Matthews**, 400 U.S. 379, 27 L.Ed.2d 476, 91 S.Ct. 431 (1971); **Allen v. Board of Elections**, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969). There is no important question of federal law presented by the Petition and accordingly, this Court should exercise its judicial discretion and deny certiorari.

A

The Decision Below Is Clearly Correct

(1) The Fifth Circuit correctly held that § 5 of the Voting Rights Act of 1965 had been complied with and federal jurisdiction was lacking.

At the trial level Petitioners based their main contention of federal jurisdiction on an alleged failure to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973(c) (1970).

Prior to 1967, Georgia law uniformly provided that the Ordinary of each county had the powers and duties of supervising elections held in this county. Ga. Laws 1964, pp. 26, 40. In 1967 the Georgia General Assembly transferred this responsibility to a county board of elections in all counties having a population of 500,000 or greater. Ga. Laws 1967, p. 3211. Pursuant to this Act, the Fulton County Board of Elections was created and it administered the November 9 election in Fulton County. Petitioners contended in the District Court that the 1967 statute was subject to § 5 of the Voting Rights Act and that it had not received judicial or administrative approval prior to enforcement. Upon being faced with evidence showing that approval had been obtained [Brief for Petitioners, A-6, -7, -8, -9], Petitioners contended that the approval was not adequate as it was obtained by Fulton County rather than the State of Georgia, and that regardless of approval, § 5 was still available to confer jurisdiction.

It is clear that appropriate approval was obtained. The regulations for complying with § 5 state, in relevant part:

> "Section 5 requires that, prior to enforcement of any change affecting voting, the State or **political subdivision which** has enacted or **seeks to administer the change affecting voting** must obtain either a judicial or an executive determination that denial or abridgment of the right to vote on account of race or color is not the purpose and will not be the effect of the change.
>
> . . .
>
> **Changes affecting voting shall be submitted by the** chief legal officer or other **appropriate official of the** State or **political subdivision in which the change is proposed to be effective.** When one or more counties within a State will be affected, the State may submit

a change affecting voting on behalf of the covered county or counties." 36 Fed. Reg. 18187 (1971) (Emphasis supplied).

Fulton County is the only Georgia county or political subdivision charged with the responsibility of administering the change ordered by the 1967 Act and it is the only political subdivision or county affected by the Act. The unrelenting efforts of the Fulton County Attorney in coordination with the Attorney General of Georgia to seek approval from the United States Attorney General of the change made by the 1967 Act is well documented. Brief for Petitioners, A-6, -7, -8, -9. Thus, the Fifth Circuit correctly concluded:

> "The Attorney General of the United States, on October 30, 1968, discharged his responsibility under § 5 by notifying the County Attorney that the 1967 Georgia Law had been approved.
> This amounted to compliance with the federal statute and with the regulations promulgated thereunder." Brief for Petitioners, A-11.

It is clear that once § 5 approval has been obtained, a private litigant cannot rely upon § 5 for jurisdiction. This Court called for dismissal in suits such as the instant case where approval has been obtained when it stated:

> "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." **Allen v. Board of Elections**, 393 U.S. 544, 549-50, 22 L.Ed. at 8.

Pursuant to this mandate, the Fifth Circuit and District Court correctly held that § 5 did not give jurisdiction to Petitioners.

(2) **The Fifth Circuit correctly held that jurisdiction is not given to the case by § 11 of the Voting Rights Act of 1965.**

Petitioners conceded at the trial that their claims of intimidation rested solely on the charges of alleged distribution of campaign literature by MARTA supporters at polling places. Taking the allegations at their broadest, the District Court concluded and the Court of Appeals agreed that they fell far short of the acts prescribed by § 11 of the Voting Rights Act of 1965. Acts giving jurisdiction pursuant to § 11 involve the use or threat of physical force or violence, or at least the use of severe economic pressure. See, **e.g., United States v. McLeod,** 385 F.2d 734 (5th Cir. 1967); **United States v. Crenshaw County,** 290 F.Supp. 181 (M.D.Ala. 1968). Accordingly, the passing out of literature is far below the mark set by § 11.

With neither race nor any form of intimidation being present in the record, the District Court concluded and the Court of Appeals agreed that § 11 of the Voting Rights Act does not furnish jurisdiction to the Petitioners.

(3) **The State Court recount of the votes mooted petitioners' claim of an inadequate state law remedy.**

Petitioners' contention that GA. CODE ANN. § 34-1704 (1970) did not provide them with a remedy to contest the Fulton election is based solely on unwarranted assumptions and an untenable reading of the Georgia law. This is shown by the two contests of the Fulton County election in the state courts. In **Henderson,** *supra,* suit was brought in Fulton County against the County Board, which employs Mr. Graham, one of the Defendants in the instant litigation. In **Ollila,** *supra,* suit was brought in DeKalb County against Mr. Graham as an employee of the County Board. In other words, the **Ollila** suit was brought pursu-

ant to the reading of GA. CODE ANN. § 34-1704 (1970), which is urged by Petitioners in the instant litigation. The result was a dismissal by the DeKalb Court on the ground that suit should have been brought in Fulton County against the County Board of Registration and Elections and the granting of a recount by the Fulton Court. As the District Court noted, Georgia's courts are liberal in construing the Georgia Election Code. The **Henderson** decision proves that the remedy to contest an election is available when the rules are followed. Petitioners had the contest remedy available had they chosen to enter state court pursuant to the rules set forth by Georgia law. Their failure to so act did not give rise to federal jurisdiction.

For all of the foregoing reasons, the Fifth Circuit and the District Court correctly held that the action should be dismissed.

B

There Is No Conflict of Decision

Petitioners' contentions that the Court of Appeals opinion is in conflict with the **Allen** case are spurious and deserve little response. Petitioners incorrectly construe the **Allen** case as holding that §5 of the Voting Rights Act is available to confer federal jurisdiction on private litigants regardless of the fact that approval under §5 has been obtained. As this Court specifically stated:

> "Once the State has successfully complied with the §5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by §5." **Allen v. Board of Elections**, 393 U.S. 544, 549-50, 22 L.Ed. 2d at 8.

Both the District Court and the Fifth Circuit relied on this exact language in making their decisions. The asserted conflict does not exist.

C

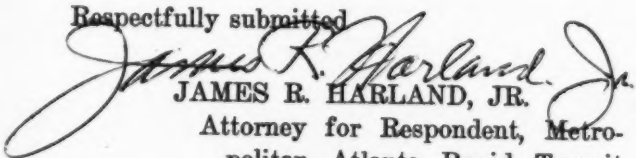
There Is No Important Question of Federal Law

This action gravitates around an election which has been thoroughly examined and well litigated in the lower and appellate courts of Georgia. Petitioners' claim of a federal question under §5 of the Voting Rights Act of 1965 is torpedoed by the actual facts and specific language of this Court in **Allen**, *supra*. The record is undisputed that the United States Attorney General specifically concurred in the enforcement of the amendment to state law. This Court has unequivocally stated that such approval removes §5 as an available avenue of jurisdiction to the private litigant. This has happened, nothing more is involved and the Petition for a Writ of Certiorari is entirely inappropriate.

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Ceritorari should be denied.

Respectfully submitted,



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Certificate of Service

I, James R. Harland, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a true and correct copy of the foregoing Brief in Opposition has been served upon counsel of record for Petitioners in this case, by placing same in the United States mail, postage prepaid, addressed to Mr. Moreton Rolleston, Jr., 2604 First National Bank Building, Atlanta, Georgia 30303.

This 29 day of August, 1972.

.....

James R. Harland, Jr.

APPENDIX

APPENDIX A

United States District Court, Northern District of Georgia, Atlanta Division

Henry D. Dodson and G. Everett Millican, Plaintiffs, vs. William Graham, Jr., as Supervisor of Elections of Fulton County, and J. W. Simmons, Clerk of the Fulton Superior Court, Defendants.	Civil Action Number 15868.

This is a suit for declaratory and injunctive relief brought by plaintiffs in the wake of the initially successful[1] referendum on November 9, 1971, for the approval of the so-called MARTA plan for rapid-transit in the metropolitan Atlanta area. Concurrently, two state suits have been filed attacking the validity of the election on the ground of various violations and seeking a recount under applicable state law. Ga. Code §34-1701 ff. Following the hearing here, a recount was ordered in Fulton Superior Court.

Originally filed as a class action, the complaint set out (1) numerous allegations of improper count, invalid ballots, and a "garden variety" of voting irregularities. In addition, plaintiffs sought to invoke federal jurisdiction on the grounds (2) that some voters were "intimidated" by the proponents of MARTA in violation of the Civil

[1] Out of some 107,000 votes in Fulton County, the announced tabulation showed a margin of only 461. The judicial recount showed a margin of 471.

Rights Act of 1964[2] and (3) that the state remedies were complicated, unworkable, and therefore in violation of the constitutional right of "due process." While the complaint also invokes the right of "equal protection", there are no allegations or evidence of discrimination by virtue of race, color, or other condition nor by virtue of the "one-man one-vote" principles implicit in such a claim. By amendment at trial, the plaintiffs switched tactics and sought a federal order voiding the entire election on the grounds (4) that the election was conducted under a voting law changed in violation of § 5 of the Civil Rights Act of 1965 (42 U.S.C. §1973c).

To the complaint, the named defendants, who are the present and former voting supervisors for Fulton County, filed answers and moved to dismiss on jurisdictional grounds. Meanwhile, MARTA, the Metropolitan Atlanta Rapid Transit Authority, was allowed to intervene and joins in the motions to dismiss. The motions to dismiss appear to be meritorious and will be granted as to all claims of federal jurisdiction.

(1) In candor, plaintiffs' counsel concedes that the voting irregularity questions are basically for the state, rather than federal, forums. In the absence of well-established equal protection questions, it is apparent that there is no federal jurisdiction over a contested state election. Traditionally, of course, court interference with elections is a creature of statute as there was no common-law judicial right in such matters. 29 CJS, *Elections*, § 245 ff. Similarly, absent a special statute or the specific equal

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[2] Apparently, reference was intended to § 11 of the 1965 Civil Rights Act [42 U.S.C. § 1973i(b)] which provides: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, * * *"

protection matters referred to, there is no federal right to vote in state elections. Consequently, federal interference in state election contests cannot *ipso facto* be warranted. **Johnson v. Hood**, 430 F.2d 610 (5th Cir. 1970). See also **Bynum v. Burns**, 379 F.2d 229 (8th Cir. 1967); **Johnson, et al. v. Stevenson**, 170 F.2d 108 (5th Cir. 1948); **Marshal v. Maginnis**, 229 F.2d 347 (5th Cir. 1956); **Peterson v. Sears**, 238 F. Supp. 12 (N.D. Iowa 1964).

(2) Looking at the claims of intimidation liberally, the most they legally can support is a violation of §11(b) of the Voting Rights Act. 42 U.S.C. § 1973i(b). Originally, the Act appeared to provide only for suits by the Attorney-General for enforcement of the rights conferred therein, mainly based on racial discrimination, not claimed here. *E.g.*, **United States v. LeFlore County**, 371 F.2d 368 (5th Cir. 1967); **United States v. Executive Com. of Dem. P. of Dallas Co., Ala.**, 254 F. Supp. 537 (S.D. Ala. 1966). However, there is legislative history to the effect that §11(b) is not limited to racial claims. U. S. Code Cong. and Adm. News, p. 2462. Also, there is an inference that private parties may bring federal suits for various violations of the Act in state election matters. See **Allen v. State Board of Elections**, 393 U. S. 544 at 555 fn. 18 (1968). However, here there is no claim that the named defendants "intimidated" anyone, but only that unnamed private supporters of MARTA did so. In such setting, it is doubtful that federal jurisdiction would lie. See **United States v. Harvey**, 250 F. Supp. 219 (E.D. La. 1966).

Assuming arguendo that individual plaintiffs could collaterally attack the acts of private parties in a suit against the voting supervisor, the suit still must fail. At trial, it was conceded that the named plaintiffs were not intimidated by anyone nor could any person be named who was, in fact, intimidated in casting his vote. The claim is only stated as a conviction that some unknown party was

in some way intimidated, although no evidence was presented to such effect. Plaintiffs contend that they may bring a class action in behalf of such unknown persons. The court knows of no authority to draw such a conclusion. To the contrary, " 'Without a class on the one hand or a proper representative on the other, a class action pursuant to Rule 23(a) must fail. It is elementary that "an individual suing in behalf of the members of the class must be a member of the class he is supposed to represent." 2 Barron & Holtzoff, Federal Practice and Procedure § 567 at 308. See 3 Moore, Federal Practice 23.04.' **Hamer v. Campbell**, 358 F.2d 215(1) (5th Cir. 1966). While great latitude has been allowed in class actions involving civil rights, it is fundamental that some plaintiff must show injury and the proposed class can rise no higher than the individual plaintiffs themselves. Thus, the plaintiffs cannot represent a class of whom they are not a part. (citing cases.)" **Wilson v. Kelley**, 294 F. Supp. 1005 (7, 8) (N.D. Ga. 1968), aff'd 393 U. S. 266. Thus, the action by the named plaintiffs must fail on this ground.

Moreover, plaintiffs admit that the claimed intimidation rests solely on the charges of distribution of campaign literature and the presence of MARTA supporters at the polling places. In this regard, taking the allegations at their broadest, the court concludes that they fall far short of the acts proscribed by § 1973i(b). If the Act prevents anyone from endeavoring to influence a vote and confers federal jurisdiction to inquire into any election in which that is done, then the District Courts' task in this regard would never be completed. It is concluded that the complaint on this basis must be dismissed for failure to state a claim upon which relief can be granted. FRCP 12. At most, the allegations show a possible violation of state election laws, which prohibit such activities within certain physical limits of the polls. See Ga. Code § 34A-1206.

Even so, it does not become a federal question, but is only another irregularity to be considered by the state in policing its own elections under the authorities cited in (1) above.

(3) Thirdly, the plaintiffs contend that their state remedies are so defective as to constitute a denial of due process. This argument is the most intriguing of all those advanced for if there is no remedy or if the statutory remedy is so meaningless as to amount to no remedy, surely some forum ought to be found to insure honest elections and accurate tallies of votes. Otherwise, the democratic processes could well be thwarted. However, it does not follow that the federal courts are needed to vindicate any such rights. Here, plaintiffs argue that the present election code could result in jurors from Fulton County being impaneled in DeKalb County because of the defendant Graham's residence therein. Ga. Code § 34-1707. Admittedly, parts of the contest provisions are cumbersome. However, the grounds for an attack on an election in Georgia are wisely broad. Ga. Code § 34-1703. More importantly, the Georgia courts have consistently demonstrated a zealous protection of voters' rights and have fashioned remedies to deal with a variety of problems without technical limitations on jurisdiction. All that is required is a reasonable showing that the result might be changed. *E.g.* **Thompson v. Talmadge**, 201 Ga. 807 (1947); **Crow v. Bryan**, 215 Ga. 661 (1960); **Laite v. Stewart**, 112 Ga. App. 853 (1965); **Lowe v. Weltner**, 118 Ga. App. 635 (1968). The Superior Courts of Georgia rightly possess great powers and as the courts closest to the people are free to deal with all of their problems in an effective manner. Any fear that they cannot do so is belied by the recount and protest hearings ordered in this instance by the Fulton Superior Court. The conclusion that the plaintiffs will be denied due process by the State is unfounded and unwarranted.

This finding is in keeping with comity considerations and specific federal authorities to the effect that such questions do not rise to the level of federal due process. **Snowden v. Hughes**, 321 U. S. 1 (1943); **Johnson v. Hood**, 430 F.2d 610 at (1, 2) (5th Cir. 1970); **Bacon v. Holzman**, 264 F. Supp. 120 (N.D. Ill. 1967). Eventually this doctrine may be eroded and at the command of Congress the District Courts may have the growing role of omsbudsman extended to that of supervising all elections on a continuing basis. In some instances, the inquiry into state elections has already been extended beyond the previously clear limits. However, in this connection, the court is constrained to the view of Judge Cameron: "The case before us involves nothing but a local political brawl. To extend federal jurisdiction to such would spread so thin the energies of the handful of men constituting the Federal Judiciary that there would be no time left for the performance of their legitimate duties. It would, moreover, lend substance to the widespread feeling that 'The Cult of the Cloth' is engaged, by some sort of bootstrap-lifting technique, in an effort to turn over to federal functionaries the most intimate prerogatives of local self-government in derogation of universally accepted tenets of State-Federal relationships. Such a concept, wherever it is given effect, cannot, in my opinion, fail to bring the whole federal judicial process into disrepute." **Tullier v. Giordano**, 265 F.2d 1 (5th Cir. 1959) (dissenting opinion at 5, 6).

(4) The Voting Rights Act of 1965 was enacted to ferret out the last vestiges of racial discrimination in voting. **Allen v. State Board of Elections**, 393 U. S. 544 (1968). To effectuate this purpose, § 4 of the Act (42 U.S.C. § 1973b) prohibits the use of literacy and related tests in those states in which less than 50% of the persons of voting age were registered on either November 1, 1964, or November 1, 1968, or in which less than 50% of those

persons actually voted in the presidential election of 1964 or 1968. In addition, § 5 of the Act (42 U.S.C. § 1973c) provides in relevant part that:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in [§ 4 above] —are in effect shall enact or seek to administer any voting qualifications or prerequisites to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on [November 1, 1964, or November 1, 1968]—such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: *Provided,* That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission,—. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to Supreme Court."

Plaintiffs contend that § 5 applies here and that it affords a basis for federal jurisdiction.

Prior to 1967, Georgia law uniformly provided that the Ordinary of each county was to supervise the counting of ballots in all state elections. In 1967 the General Assembly transferred this responsibility to an appointed "Supervisor of Elections" in all counties having a population of 500,000 or greater. As Fulton County was included in this category, the new Act applied to it. Plaintiffs contend that the 1967 statute imposes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on November 1, 1964, and that therefore it may not be enforced without prior judicial or administrative approval. They contend further that approval was not properly obtained and that the MARTA referendum is accordingly void.

Relying on **Allen**, *supra*, plaintiffs argue (1) that they have standing to litigate the applicability of § 5 in spite of their status as private parties, and that, upon proof of the State's failure to secure approval, they are entitled to an order voiding the election; (2) that as private parties they are not required to maintain the present action in the District of Columbia; and (3) that they are entitled to a determination of their contentions by a three-judge court.

As far as it goes plaintiffs' reading of **Allen** would appear to be correct. However, it is undisputed on the present record that the State has in fact secured the Attorney General's approval of the 1967 statute. See Defendants' Exhibits 1, 2, 3, 4. By letter dated April 18, 1968, the Fulton County Attorney formally submitted the statute to the Attorney General and requested his advice on the matter. By letter of October 30, 1968, the Attorney General's office replied that it did not find the statute objectionable. Plaintiffs argue that submission by the County Attorney, rather than by the State Attorney General, is

insufficient inasmuch as a **state** statute was involved. Although the Court would not regard this distinction as significant in any event, it does appear from the County Attorney's letter that the submission was made at the specific request of the State Attorney General. For all practical purposes, then, the approval requirements have been satisfied. This being the case this Court's inquiry under § 5 is at an end. **Perkins v. Matthews,** 400 U. S. 379 (1971). As the Supreme Court made clear in **Allen:**

> "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." (p. 549-550.)

Although the Court need not reach this issue for purposes of its decision, it feels constrained to state that in its view § 5 was never intended to cover the kind of election law change involved here. Section 5 provides that until approval of the proposed change has been obtained "no person **shall be denied the right to vote** for failure to comply" with such change. It is difficult to conceive just how a transfer of supervisory responsibilities could operate to deny anyone the right to vote. Plaintiffs have made no allegation, much less any showing, that this change was racially motivated or that it is otherwise discriminatory. Absent such allegation and showing there is simply no basis on which to conclude that the change is comprehended by § 5.

The Court is aware that, under **Allen,** the latter question concerning the applicability of § 5 to the voting change must ordinarily be determined by a three-judge court. In recent years, however, the number of requests for three-judge courts has increased greatly, and, in the interests of judicial economy, the district courts have often been compelled to have an initial investigation by a single

judge to ascertain whether three-judge jurisdiction is actually present or not. Such is the case here. Having found that administrative approval has been obtained, the court is satisfied that there is no genuine controversy to submit to a three-judge panel under the **Allen** case. Accordingly, the prayer for a three-judge court is denied.

In the absence of necessary grounds of equal protection and for the reasons stated herein, the motions to dismiss for lack of federal jurisdiction are granted. Rule 12(h)(3).

It is so ordered.

This the 30th day of November, 1971.

/s/ SIDNEY O. SMITH, JR.
United States District Judge